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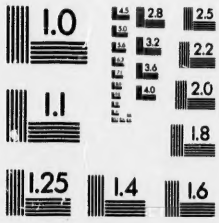

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LOWER-CANADA }

Court of Appeals.

NOVEMBER SESSION, 1820.

DAVID ROSS,
(Defendant in the Court below)
APPELLANT;

AND

WILLIAM GLENN ANDERSON,
RESPONDENT.

APPELLANT'S CASE.

filed 14 Nov. 20
L M

A. STUART for Appellant.

PROVINCE OF LOWER-CANADA,
DISTRICT OF QUEBEC.

In Appeal.

BETWEEN

DAVID ROSS,
(Defendant in the Court below)
APPELLANT;

AND

WILLIAM GLENN ANDERSON,
(Plaintiff in the Court below)
RESPONDENT.

APPELLANT'S CASE.

THIS was an action of General *indebitatus assumpsit*, brought in the Court of King's Bench, for the District of Quebec, by the Respondent, against the Appellant, for the recovery of £6028, sterling, which the former stated to be due to him by the latter.

The various transactions, out of which the present litigation between these parties has originated, are referred to in a long correspondence between the parties, to be found upon the files of the cause.

It appears that, on the 13th of November, 1813, the Appellant enclosed to the Respondent, by the recommendation of their mutual friend, Mr. James Ewing, of Halifax, a "small "order for goods, to be executed for him (the Appellant) upon the most liberal terms." The Appellant expresses, in this letter, "every reliance and confidence in the skill and attention of "the Respondent."--No. 68, of Record.

Upon receipt of this letter the Respondent immediately, by his letter of 31st January, 1814, acknowledges its receipt—states that the order for goods "will be executed on the best terms, "and the goods shipped from the different ports by the first Spring vessels"—proceeds to give an account of the state of the markets, and concludes with saying, "any goods you order, and "to which you put down prices, must be laid in much dearer, as it is impossible to lay them in "at the prices quoted by you. I shall, however, use every exertion to lay them in as low as "possible, and have no doubt but, in most cases, they will be found as well laid in as any of "your neighbours'."

The Respondent accordingly executed the before-mentioned order; and, in his letter of the 8th of April, 1814, accompanying the goods, writes, "I have always been in the habit of "reducing the orders from my Halifax friends, when the articles were much higher than former "shipments, and in many instances have sent none, well knowing the difficulty there is in "America to raise goods, corresponding to the advance here, *all at once*; at the same time I "have always been in the habit of materially increasing the orders of our friend Ewing of such "goods as could be bought low, according to circumstances and appearances—had I the same "liberty from you, I cannot help thinking but it would be for your advantage.

"I am extremely sorry the opening of our correspondence has so unpropitious an appear-"ance, owing to the very *high prices* of goods this year; had I been so fortunate as to have "had your orders for last year, I think much good might have been done; I do not, however, "think that the present high prices of cotton and woollen goods will continue long; should "you be disposed to send an order for the Fall you may rest assured I shall do the best I can "for your interest; and, if you leave it in my power to add or diminish it, according to cir-"cumstances, I am sure it will be for your advantage. From the great changes which may be "expected to take place in Europe, things may be very different on receipt of your orders here, "to what they are at the time you are making them out; *were a peace to take place, either "with America or France, it would produce great changes in this country; and if there was "any prospect of a peace with the former, I would ship but very sparingly to my Halifax "friends, and I should suppose it would be most adviseable to follow the same rule in shipping "to your place.*" *Glasgow, 8th April,* 1814.——No. 24.

"It is the opinion of most people here that both woollen and cotton goods will fall, in-"deed cotton goods have already declined a little; and as coarse woollens advanced in conse-"quence of the great demand from Government for the armies, *they must also very soon be "lower.* At present things are very unsettled, and but little doing, it will be some time before "business gets settled into a regular train."

Glasgow, 21st April, 1814.——No. 25.

The Appellant writes, on the 20th July, 1814, to the Respondent, acknowledging the receipt of the last mentioned letter, and saying, "your just determination of not shipping any more "carpets, or East India goods, &c. at the present enormous prices, merit my most *grateful thanks,* "and by which means I must save money. I wish you always to use the same discretion and "intelligence in diminishing, enlarging, or entirely cancelling such articles as you may deem dis-

advantageous

" advantageous, and substituting others, as you may judge most proper *for my interest, and the* " *aspect of the times.*" *Quebec, 20th July,* 1814.———No. 70.

These two documents constitute the principal feature in the cause. It will be seen hereafter that the Respondent conceived that the discretionary power thus vested in him, to be *used for the benefit of the Respondent,* he, the Appellant, might grossly *abuse, to the ruin of the Respondent.*

The Judgment of this Court will determine whether the Respondent was right in this opinion, or otherwise.

The letters from the Respondent to the Appellant, from this period, contain frequent allusions to the probable effects of the political events then going on upon the state of the market.

Thus in a letter of the Respondent's principal clerk, of the 10th June, 1814, it is said :—

" Business has been very dull in this Country for the last two months, not only in all kinds " of Colonial produce, but also in almost all descriptions of British manufacture, (hardware " goods excepted) particularly cotton *goods*; and, from the great fall in the raw material, " woollen goods must also be very considerably reduced; in fact it seems to be the general " impression, not only here, but over all Europe, that *every description of goods must be greatly* " *reduced in their value, in consequence of a general peace.*"—No. 26, of Record.

In another letter of the Respondent, of the 30th August, 1814, it is said, " woollens and linens will be much lower next Spring."

In an other letter of the Respondent, of the 1st September, 1814, it is said, " It is now con- " fidently reported that the negociations at Ghent are broken off for a time—in consequence " of which the holders of American produce are demanding much higher prices. Quer- " citron Bark has been sold at £20 per cwt. If we had peace with America it would not bring " 10s, per cwt. From the rise in cotton wool, heavy cotton goods must also experience a rise in " price. Although peace with America is an event apparently at some distance, I would not ad- " vise you to speculate in ashes and staves, unless they could be bought at moderate prices with " you; below I quote the present price of these articles, but you are aware a peace with America " would produce a very great alteration in them, and *this event may be nearer than most people* " *suppose.*"—No. 29, of Record.

In another letter of the Respondent, of the 3d October, 1814, it is said, " the prices of " woollens are now fully as high as they were when your spring shipment was made, this is " owing to the very high price of the raw material. Cotton goods are rather looking up, but I " do not expect there will be any very great change in them. Linen goods continue very " stationary."—No. 31, of Record.

Again, in a letter of the Respondent, bearing date 2d December, 1814, it is said, " the " prices of coarse wool are now higher than ever they were before, of course, coarse woollens will " be very high in the spring. Cotton goods are now very low, but if the American war con- " tinues there will be an advance in a very short time. Cotton yarn is now so high that the ma- " nufacturers are loosing by what they are doing at the present prices for goods. In hard- " ware goods there is little or no variation.

" Ashes and staves are now very high, the latter would now bring £200 per M. and the " former perfectly sound would now command 25s. per cwt. but so much does the continu- " ance of these prices depend on the American War that I would by no means advise you to " speculate on them, unless you see your way perfectly clear."—No. 32, of Record.

The letter of the Appellant enclosing an order for goods to the Respondent to be sent in the spring, 1815, bears date the 22d November, 1814. In it the Appellant says, " I take " the liberty of enclosing a small order for goods for the ensuing season, which I hope you will " do me the favor of executing on the lowest terms possible to be obtained, in the selection of " which I have the utmost confidence my interest will be the sole object of attention. Pur- " chasing at the very lowest prices and from the most reasonable houses, choosing the most suit- " able articles and putting them up in the best order will enable me to make speedy sales, early " remittances and have a decided advantage of a benefit to myself—making Insurance on the " amount as usual."—No. 72, of Record.

And lower down, adverting to an event which has been so frequently referred to in the course of this correspondence, the Appellant says, " if the American War is continued, it will " create a considerable demand from these Provinces."

On the 1st February, 1815, the Respondent having it is presumed, previous to that time, received the above mentioned order, writes to the Appellant as follows, " You may rest as- " sured I shall do all I can this year, to have your goods well laid in, and *when they are* " *very high, I shall either omit these altogether, or reduce the quantity you have ordered.*"— No. 33, of Record.

It will be observed that the respondent takes no notice in this letter of the signing of the preliminaries of Peace between Great-Britain and America, which had taken place in the previous month of December, nor did he curtail the Appellant's order in the manner in which from the understanding between the parties, manifested in the foregoing letters, and from the then

"then *aspect of the times*, the Appellant had a right to expect. The just expectations of the Appellant are expressed in his letter of the 27th February, 1815, in it he says, "ever since my last, "rumours of peace or certain anticipations of it, put a stop to all buying and selling, and it is "now acquiring entire credit. We expect that this news will reduce the present discount. If "it should be peace, the demand for goods will not be so rapid, we may suppose the army will "in a great measure be withdrawn. In that case, if it is not too late *I should think one half* "*my order in general sufficient*, fearing prices may decline while they are on hand. I trust all to "your superior judgment, and have not doubt but you have anticipated as far as you thought "most eligible for my interest at the time of purchasing, you knowing the certainty of the rela-"tive situation of the contending powers and the influence it was likely to produce on goods in general."—No. 79, of Record.

On the 4th April, 1815, the Respondent advises the Appellant of shipments to him to the amount of about *eight thousand pounds*, "and at the same time informs him that immense ship-"ments have been made by Canadian gentlemen who have been home during the winter. "I suppose with a view of getting them into the United States. *I think in the end* they *will* "be sorely *disappointed*."

In the letters acknowledging the receipt of these goods, the Appellant points out several overcharges. In his letter of 20th August, 1815, he says, "I have almost all the salampores "of Thomas Gould & Co. of last years, which cost 27*s*. and 28*s*. Sterg. per piece still on hand, "as I could not sell them at the beginning but at a loss, my neighbors selling much under what "I could afford them at. And four bales more of this year's at 22*s*. 6*d*. & 23*s*."

"I find my neighbors have been furnished with Salampores of exactly the same quality "and width, at the last March Sales at 17s4 to 17s8 pr. ps.—Yellow Silk Bandanoes, 24s6, "where I am charged 28s6, 40s pr. ps. 16 ea. Silk Coungee Romals, do. do. 46s These cir-"cumstances demand your immediate attention. I hope you will obtain such liberal deduc-"tions, as will put me on a footing wich my neighbors in the market, as I know you possess "the inclination to get me every just satisfaction from the parties concerned."---No. 75 of Record.

Notwithstanding the above circumstances, such was the implicit confidence of the Appellant in the Respondent's honor and discretion, that on the 20th November, 1815, he transmitted to him a new and considerable Order. "I now enclose you (says he) a small order for "goods for the ensuing season, which I hope you will find convenient to purchase with *ready* "*money*, as in that case, I am persuaded, you can procure the goods perhaps 15 or 20 pr. ct. cheaper than the common run, and I shall allow you interest from the moment of issue, and "any other reasonable additional advance that may attach—and in return I promise quick re-"mittances."

With respect to the "aspect of the times" the Respondent affords, from time to time, information. In his letter of 28th August, 1815, (he says) "The prices of Woollen and Cot-"ton goods keep very high, but I do think by the spring, many descriptions of goods must be "lower. Indeed from present appearances, I would advise you to keep your stock of goods as "low as possible, for I am not without my fears of having very bad times in this country very "soon; at present, money is very scarce, and I think *all descriptions of produce as well as bri-*"*tish manufactures are too high to be maintained in a state of peace with all the world*."—No. 44, of Record.

In his letter of 28 September, 1815, (he says) "I am truly sorry your market is so overload-"ed with goods, but from the small shipment made this fall, I hope it may soon be relieved as "I understand goods continue in good demand at New-York; I therefore calculate that dur-"ing the winter a great many fine goods may be smuggled into the United-States, from your "Province"—No. 45, of Record.

"Again in his letter of 21st October, 1815, "The prices of Linen, Cotton and Woollen goods, "continue as last advised, but in my opinion *the present high prices cannot be maintained in a* "*a profound peace*."—No. 46, of Record.

Again, in his letter of the *30th March*, 1816, the Respondent says, "*My shipments to you*, "*this Spring, will be very small indeed, which I consider most fortunate, as I understand busi-*"*ness is very bad with you, and things were never worse here*."—No. 51, of Record.

Again in his letter of 8th April, 1816, "Great distress in the mercantile world still prevails "all over this country, and little or no appearance of any change. *Goods will in general, go* "*out in the fall cheaper than they do this spring*. Carpeting is down 3d per yard since I "bought your's, and will be still lower."—No. 53, of Record.

Again in his letter of 6th April, 1816, (he says) "I am very sorry to say business continues "in a very depressed state all over this country, without any appearance of a change—Confi-"dence is totally gone and failures multiply. I sincerely hope you had closed the sales of "consignments", and after entering into a variety of details respecting the distresses of the country, he concludes with saying, "there is not the smallest accommodation now to be got, "every one being worse off than another for money—they will, however, have this goodeffect, "a great number of speculators will be driven out of the different markets, and trade wil again "go on regularly and with more certainty, *but a great deal less business must be done by all*." —No. 53, of Record.

The

The same thing is repeated in his letter of 26th April, 1816,—No. 54 of Record.

Again in his letter of the 27th May, 1816, (he says) " The times continue very bad, now " in fact worse than when I last wrote you, and I am sorry to say there is no great appearance " of any change for the better, there is, in fact, no business doing of any kind, and what may " be the end of all no one can say. The failures have, indeed, in some degree subsided, " but confidence is completely gone, and immense sums are locked up by the recent failures."

Again in his letter of the 1st. July, 1816, (he says) " Business continues here dull in the " extreme ; in fact, there is nothing at all doing, and the manufacturers are going idle about " the country, not more than one half being now employed—(and he goes on at the conclu- " sion of the letter to say) " I suppose within the last six months, nearly the half of the peo- " ple in business in this country have failed, consequently when there is any thing to do, there " will be much fewer to do it—little is expected to be done this year, *next I hope will enable* " *us to make up what will be lost this, never were such times at the present witnessed in this* " *country, I hope they are better with you.*"—No. 56 of Record.

The sentiments of the Respondent respecting the " aspect of the times," in 1816, are not more distinctly expressed by his words than they were evinced by his conduct—

In the previous years he had made consignments in which he was himself, interested. Early in this year he urged the immediate closing of his consignments, and made no more.

Notwithstanding this, the Respondent, without previously consulting the Appellant, in direct contradiction to the views expressed by the Appellant, and of those expressed by himself, and without condescending to make the slightest explanation of his conduct, shipped to the Appellant, on the 29th April, 1816, goods to the enormous amount of £5140 17 1, sterling; and containing a variety of articles neither ordered nor wanted by the Appellant, and many of them at a higher price than those limited by the Appellant.

The Appellant, on the arrival of these goods, immediately wrote to the Respondent, under date of the 13th June, 1816, as follows : " I am under the painful necessity of informing you that I hold the following goods for account of the furnisher, or others concerned, and wait their further orders respecting the disposal of them, to wit :" (here follows a description of the goods.)

" The disappointment is not trifling to me, as I lose my customary profits of the season ; did " those Gentlemen consider but one interest—if they could not furnish the order at the limits, " they should have declined it, which would ultimately be more advantageous and agreeable to " all concerned.—I request of you to credit my account with all those respective sums, with " every attendant charge thereon, and advise me as soon as possible."

The goods sent, without orders, are the following :—

Archd. Liddle, & Co. 1 cask Putty,	..	..	..	£6	6	0
Wheek & Lenwoods, 12 figured Rugs	..	..	..	25	18	10
Oates, Wood & Malhyor, 4 ends Coating,		..	..	29	16	9
				£62	1	7

The amount of the overcharges upon the goods, which the Appellant refused to accept upon his own account, will appear from a statement subjoined to the present case.

The bad state of the market, at Quebec, is established by the testimony of many witnesses, who were examined on the cause. Overcharges are also clearly proved, as will be seen on reference to the *Enquête*.

The Respondent did not attempt to prove that the sums charged were actually paid by him.

Upon these facts it was contended in the Court below—

1.—That the order being to make the purchases for *cash*, the Respondent was bound either to accept the Appellant's proposal, in the form in which it was made, or to reject it, and that he was not warranted in making purchases upon a credit price.

2dly.—That the discretionary power given to the Respondent, by the Appellant, in his letter of the 20th July, 1814, related to the articles to be sent, and by no means to the *prices* of those articles ; otherwise the limitation of price would have been merely nugatory.

3dly.—Supposing, hypothetically, that the discretionary power of the Respondent extended to the prices of the articles, the Respondent was to be regulated, in the exercise of it, " by the interest of the Appellant, and the aspect of the times. Now, by the Respondent's own correspondence, it is manifest that " the interest of the Appellant, and the aspect of the times," required that the goods in dispute should not have been shipped for the Appellant.

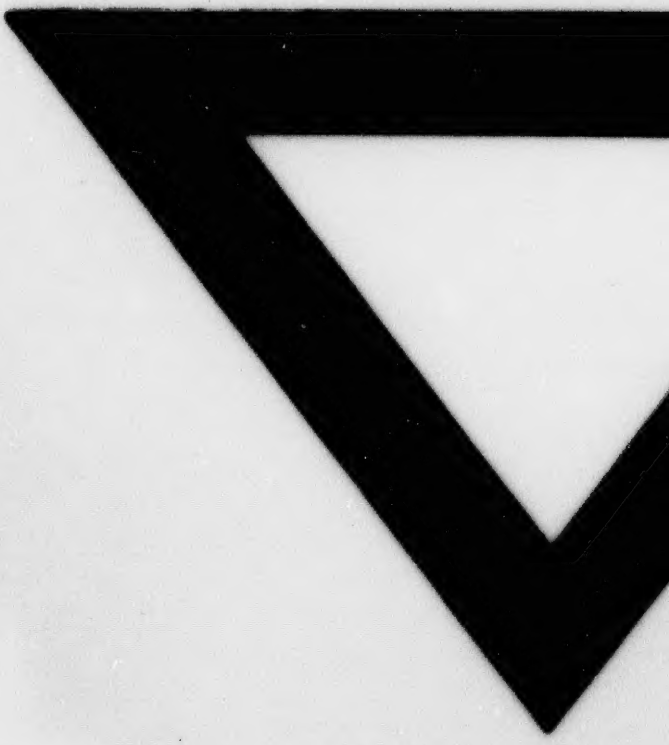
4thly.—Supposing, again, that the above words did not limit the discretionary power of the Respondent—it was limited by law—for, " when any thing is left to any person to be done ac- " cording to his discretion, the law intends it must be done with sound discretion, 1 Lil. Abr. " 477," (so also, 2 Ins. 56. 298.—Hob. 158. D. l. 76 pro Socio—l. 24 Locati—l. 22 De Reg. Jur.) The abuse of this discretionary power, if any he had, can then constitute no good ground of defence for the Respondent.

5thly.

5thly.—There is no evidence of the prices at which the goods in dispute were purchased—nor of the time of the purchase—nor that, in point of fact, they were purchased *for* the Appellant—nor that they were charged at the usual and ordinary prices at which goods of a like description were, in the Spring of 1816, bought and sold in Great Britain.

6thly.—But the capital defect in the Respondent's evidence is, that he has not proved that he has *paid* for these goods at the prices charged by him—nor that he has paid for them at all. The act of an agent, within the scope of his authority, binds his principal. The furnishers of the goods, in Great Britain, have their remedy against the Respondent, and against the Appellant also. Until the debt was discharged by the Respondent, he had no recourse against the Appellant. His action, in technical language, is an action "for money laid out, expended and paid." The payment of the money by him, in discharge of the Appellant, constitutes the very gist of his action, and ought therefore to be strictly proved.

These are the principal objections to the final judgment rendered in the cause; yet the Court below, on 7th June, 1820, condemned the Appellant to pay to the Respondent the sum of £5746 4 1, stg. equal to £6384 13 5, currency, with interest thereon, from 28th of April, 1818, and costs.

There are two interlocutory orders in the cause, of which the Appellant also complains; the one, an order rejecting the application of the Appellant for a trial by Jury; the other, an order rejecting an application of the Appellant for a Commission to examine witnesses residing in Great Britain

See Respondent's Case, post. p. 493.